

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY	)
AVERAGE WHOLESale PRICE	) MDL NO. 1456
LITIGATION	) Civil Action No. 01-12257-PBS
	) Subcategory No. 03-10643
THIS DOCUMENT RELATES TO:	)
	) Judge Patti B. Saris
<i>The City of New York, et al.</i>	)
	)
v.	)
	)
<i>Abbott Laboratories, Inc., et al.</i>	)

**JANUARY 2010 STATUS REPORT ON BEHALF OF  
THE CITY OF NEW YORK AND NEW YORK COUNTIES**

The undersigned counsel for the City of New York and New York Counties in the above-captioned action (hereinafter referred to as “plaintiffs”) hereby submit the attached Status Report for January 2010, in accordance with the Court’s June 17, 2004 Procedural Order.

Dated: January 4, 2010

Respectfully submitted,

**City of New York and New York  
Counties in MDL 1456 except Nassau  
and Orange, by**

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By:

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**January 2010 Status Report on Behalf of the  
City of New York and New York Counties**

**FUL Summary Judgment Briefing**

**1. Supplemental Filings**

On July 8, 2009, the Court heard oral arguments on the parties' respective motions for partial summary judgment on FUL issues. At the hearing, the Court requested a filing from the Department of Justice ("DOJ") to supplement the Brief of the United States on the Federal Upper Limit, filed June 28, 2007 [Docket No. 4413].

On November 25, 2009, the DOJ filed its Supplemental Brief of United States on the Federal Upper Limit. *See* Docket No. 6693, Sub-Docket No. 183.

On December 9, 2009 defendants filed their Response to the Supplemental Brief of the United States on the Federal Upper Limit. *See* Docket No. 6751, Sub-Docket No. 189.

On December 16, 2009, plaintiffs filed their reply to defendants' response to the Supplemental Brief of the United States on the Federal Upper Limit. *See* Docket No. 6766, Sub-Docket No.190.

The parties' motions remain *sub judice*.

**2. Defendants' Motion to Exclude Plaintiffs' Expert Testimony**

On January 4, 2010, the Court granted defendants' motion for leave to file a Reply Memorandum in Support of Joint Motion to Exclude the Proffered Expert Report and Testimony of Harris Devor, C.P.A. [Docket No. 6281; Sub-docket No. 150]. *See* the Court's electronic order entered January 4, 2010.

**GSK Motion for Partial Summary Judgment**

On December 4, 2009, the Court entered an order denying SmithKline Beecham

d/b/a GlaxoSmithKline's Motion for Partial Summary Judgment. *See* Docket No. 6735.

## **Discovery**

### **1. Motion to Compel Discovery from Defendant Merck**

On September 4, 2009, plaintiffs filed their Motion to Compel Discovery from Defendant Merck for all at-issue drugs with annual AMP/AWP spreads over 30 percent. *See* Docket No. 6487; Sub-docket No. 158.

On October 5, 2009, Merck filed its opposition to plaintiffs' motion to compel. *See* Docket No. 6572, Sub-docket No. 168.

On October 23, 2009, plaintiffs filed their Motion for Leave to File Reply Memorandum in Further Support of Plaintiffs' Motion to Compel Discovery from Defendant Merck & Co., Inc., and Exhibits to the Declaration of Joanne M. Cicala in Support Thereof Under Seal. *See* Docket No. 6609, Sub-docket No. 175. This motion remains *sub-judice*.

### **2. Schering's Motion for a Protective Order**

Given the Court's denial of GSK's motion for partial summary judgment [Docket No. 6735], plaintiffs will file their motion to lift the Schering Protective Order on or before February 12, 2010.

### **3. Deposition of New York State Department of Health**

The deposition of Mark-Richard Butt will take place on January 12, 2010.

### **4. NYDOH Document Production**

On November 3, 2009, defendants wrote James B. McGowan, Assistant Attorney General with the Office of the New York Attorney General ("NYAG") to request that New York State Department of Health ("NY DOH") produce all documents for which

NYDOH had asserted a deliberative process privilege in its March 13, 2009 privilege log.

AAG McGowan, defendants and counsel for plaintiffs met and conferred on December 1, 2009 and December 10, 2009, to discuss the issue. On December 18, 2009, NY DOH produced certain previously withheld documents. For some of these documents, NY DOH withdrew the previously-asserted privilege. For others, NY DOH produced documents in the interest of judicial efficiency and because it concluded the Court would direct production, notwithstanding the deliberative process privilege, based on a balancing test.

Notwithstanding the supplemental NY DOH production, on December 23, 2009, defendants filed a motion to compel production of all documents which NY DOH continues to withhold on the basis of the deliberative process privilege. *See* Docket No. 6810, Sub-docket No. 191. In the ordinary course, the NY DOH's response to defendants' motion would have been due January 6, 2010. At NY DOH's request, defendants have agreed that the NY DOH response will be due January 20, 2010.

### **CERTIFICATE OF SERVICE**

I, Kathryn Allen, hereby certify that on the 4th day of January, 2010, I caused a true and correct copy of the above January 2010 Status Report for the City of New York and New York Counties to be delivered to counsel of record for defendants by electronic service pursuant to Case Management Order No. 2 entered by the Honorable Patti B. Saris in MDL No. 1456.

Dated: January 4, 2010

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